(7)

NO. 02-1541

JUL 7 2003

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF IOWA,

Petitioner

vs.

FELIPE EDGARDO TOVAR,

Respondent.

PROOF OF SERVICE

I, Theresa R. Wilson, do swear or declare that on this date, July 7, 2003, as required by Supreme Court Rule 29, I have served the Attached Motion to Proceed in Forma Pauperis and Respondent's Brief in Opposition on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Thomas J. Miller, Attorney General of Iowa, Hoover Building, 2nd Floor, Des Moines, IA 50319

Douglas R. Marek, Deputy Attorney General, Hoover Building, 2nd Floor, Des Moines, IA 50319

Darrel Mullins, Assistant Attorney General, Hoover Building, 2nd Floor, Des Moines, IA 50319

35 pp

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 7, 2003.

Respectfully submitted,

THERESA R. WILSON
Counsel of Record
Assistant Appellate Defender
Lucas Building, 4th Floor
321 East 12th Street
Des Moines, IA 50319
(515) 281-8841
Counsel for Respondent

NO. 02-1541

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF IOWA,

Petitioner

vs.

FELIPE EDGARDO TOVAR,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent asks leave to file the attached Respondent's Brief in Opposition without prepayment of costs and to proceed in forma pauperis.

Respondent has previously been granted leave to proceed in Johnson County District Court for Iowa; Iowa Court of Appeals; and Iowa Supreme Court.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Respectfully submitted,

THERESA R. WILSON
Counsel of Record
Assistant Appellate Defender
Lucas Building, 4th Floor
321 East 12th Street
Des Moines, IA 50319
(515) 281-8841
Counsel for Respondent

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

respondent

I, Felise Tovar, am the ^ in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$
Interest and dividends	$ 0	$ 0	$ 0	$
Gifts	$ 0	$ 0	$ 0	$
Alimony	$ 0	$ 0	$ 0	$
Child Support	$ 0	$ 0	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$	$
Disability (such as social security, insurance payments)	$ 0	$ 0	$	$
Unemployment payments	$ 0	$ 0	$	$
Public-assistance (such as welfare)	$ 0	$ 0	$	$
Other (specify): Loans yearly T.R.W.	$ 10,000	$ 0	$	$
Total ~~monthly~~ income: yearly T.R.W. (computes to $833.33/mo) T.R.W.	$ 10000	$ 0	$	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other:	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 1,000	$ total due
Department store(s)	$ 0	$
Other:	$ 0	$
Alimony, maintenance, and support paid to others	$ 300	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify):	$ 0	$
Total monthly expenses:	$ 300	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
MCI	Iowa City IA	Aug. 2000	$ 1000
		Aug. 2001	$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $ 1,000
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
0		$ 0	$
		$ 1	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model 0
Value

☐ Motor Vehicle #2
Year, make & model 0
Value

☐ Other assets
Description 0
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
0	$ 0	$ 0
1	$	$
0	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Emilio Tovar	Son	5

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☒ No Is property insurance included? ☐ Yes ☒ No	$ 0	$ -
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ -
Home maintenance (repairs and upkeep)	$ 0	$ -
Food	$ 0	$ -
Clothing	$ 0	$ -
Laundry and dry-cleaning	$ 0	$ -
Medical and dental expenses	$ 0	$ -

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☒ Yes ☐ No If yes, describe on an attached sheet. expect to start working in Aug. '03 Full time

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Recently graduated from University of Iowa and I am looking for work at the current time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 1st, 2003

Felipe Tovar
(Signature)

SUBSCRIBED AND SWORN to before me by Felipe Tovar on the 1st day of July, 2003.

Renee D. Tadlock
Notary Public in and for said State

RENEE D. TADLOCK
Commission 136782
Expires 8/29/03

NO. 02-1541

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF IOWA,

Petitioner

vs.

FELIPE EDGARDO TOVAR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE IOWA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully submitted,

THERESA R. WILSON
Counsel of Record
Assistant Appellate Defender
Lucas Building, 4th Floor
321 East 12th Street
Des Moines, IA 50319
(515) 281-8841
Counsel for Respondent

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Iowa Supreme Court, under the Sixth and Fourteenth Amendments to the United States Constitution, may require a district court to advise a pro se defendant who wishes to plead guilty of the usefulness of an attorney, that an attorney may provide an independent opinion as to whether it is wise to plead guilty, and that without an attorney the defendant may overlook a defense?

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STATEMENT OF THE CASE

Respondent generally agrees with the facts of the case and course of proceedings as described in the Petition. Respondent respectfully disagrees, however, with Petitioner's claim that the Iowa Supreme Court's decision will have an adverse impact on the plea process and on prosecutors' ability to charge enhanced offenses. The substance of Respondent's disagreement on this issue is discussed in Section IV of the Reasons for Denying the Petition below.

REASONS FOR DENYING THE PETITION

I.

The Decision of the Iowa Supreme Court Rests on Established Precedent Set by the United States Supreme Court.

Petitioner asserts that the Iowa Supreme Court's decision "propagates the Ninth Circuit's minority view of the Sixth Amendment." (Petition at 21). While the Iowa Supreme Court did, in fact, make reference to a Ninth Circuit decision, the Iowa Supreme Court's rationale is consistent with established United States Supreme Court precedent.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In Gideon v. Wainwright, the United States Supreme Court determined that the right to assistance of counsel was a fundamental right applicable to the States via the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963).

The United States Supreme Court has long recognized the importance of counsel to an accused. In Powell v. Alabama, this Court stated that "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Thus, due process requires that an accused be given time and opportunity to secure counsel. Id. at 53. The Sixth Amendment, in particular, "embodies a realistic recognition of the obvious truth that the

average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). The purpose of the Sixth Amendment is to protect defendants from convictions obtained based upon their "own ignorance of [their] legal and constitutional rights." Id. at 465.

The right to counsel attaches at all critical stages of a criminal proceeding, from arraignment through sentencing. Carter v. Illinois, 329 U.S. 173, 174 (1946). This includes a guilty plea proceeding. Boyd v. Dutton, 405 U.S. 1, 2 (1972)(per curiam); Rice v. Olson, 324 U.S. 786, 788 (1945).

This Court has addressed the particular usefulness of counsel during plea proceedings. "A plea of guilty is different in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction." Von Moltke v. Gillies, 332 U.S. 708, 719 (1948). The determination of guilt can be a complex legal task even for an educated and intelligent layperson. Id. at 721. The issue of guilt may turn on the legal construction of a statute, rather than admitted facts. Adams v. United States ex rel. McCann, 317 U.S. 269, 285 (1942)(Douglas, J., dissenting). "[A]n intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." Brady v. United States, 397 U.S. 742, 748 n.6 (1970). The provision of counsel during a guilty plea also protects a defendant from coercive conduct by the prosecution. Id. at 754. Counsel is needed [at a plea proceeding] so that the

accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." Argersinger v. Hamlin, 407 U.S. 25, 34 (1972).

Although an accused is entitled to the assistance of counsel at every critical stage of a criminal proceeding, an accused may choose to voluntarily and intelligently waive his right to counsel. Adams v. United States ex rel. McCann, 317 U.S. 269, 275. Such a waiver must be a voluntary, knowing, and intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." United States v. Ruiz, 536 U.S. 622, 629 (2002); Brady v. United States, 397 U.S. 742, 748 (1970). An accused must be made aware of the dangers of self-representation so that the record establishes he knows what he is doing "'with eyes open.'" Faretta v. California, 422 U.S. 806, 835 (1975). A judge has a duty to "investigate as long and as thoroughly as the circumstances of the case before him demand"; it is not enough for an accused to say that he has been informed of his right to counsel and wishes to waive it. Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948). The courts will indulge every reasonable presumption against waiver. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Following this established precedent, the Iowa Supreme Court determined that "a defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel." (Petition App. at 18). This advice, according to the Iowa Supreme Court, should consist of advising the

defendant: "generally that there are defenses to criminal charges that may not be known to laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked"; "that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty"; and regarding "the nature of the charges against him and the range of allowable punishments." (Petition App. at 18). The Iowa Supreme Court specifically stated that the trial judge was not to assume the role of an attorney and was not expected to discuss particular defenses with an accused. (Petition App. at 18).

The decision of the Iowa Supreme Court considered the usefulness of counsel *at the plea proceeding*. It specifically noted that "the discussion between Tovar and the court with respect to the usefulness of counsel at trial did not suffice to advise Tovar of the usefulness of counsel at the plea stage." (Petition App. at 16). The Iowa Supreme Court specifically found that there was an "absence of any dialogue concerning the value of having an attorney when pleading guilty," that the trial court failed to alert Respondent to the dangers of entering a guilty plea without the advice of counsel, and that the court did not warn Respondent of the availability of legal defenses that "he, as a layperson, would not recognize." (Petition App. at 16).

Although the Iowa Supreme Court quoted favorably from United States v. Akins, 276 F.3d 1141 (9th Cir. 2002), the Iowa Supreme Court also rooted its decision in several United States Supreme Court cases. (Petition App. at 7-18). It cited Johnson v. Zerbst,

Von Moltke v. Gillies, and Argersinger v. Hamlin regarding the importance of counsel at critical stages of the plea proceedings, including guilty pleas. (Petition App. at 7-9). See Argersinger v. Hamlin, 407 U.S. 25 (1972); Von Moltke v. Gillies, 332 U.S. 708 (1948); Johnson v. Zerbst, 304 U.S. 458 (1938). It cited Brady v. United States regarding the requirements for waiver of the right to counsel. (Petition App. at 9). See Brady v. United States, 397 U.S. 742 (1970).

Most notably, however, the Iowa Supreme Court cited Patterson v. Illinois for the proposition that courts should take a pragmatic approach to the waiver of counsel. (Petition App. at 9-10). See Patterson v. Illinois, 487 U.S. 285 (1988). In Patterson, the United States Supreme Court held that the waiver inquiry must take into consideration "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage." Id. at 298. The Court defined "the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." Id.

In Patterson, the question was the role of counsel at post-indictment questioning. Id. Because the role of counsel at postindictment questioning is "rather unidimensional", Miranda warnings were sufficient to advise the defendant of the dangers of self-representation. Id. at 294. The United States Supreme Court recognized, however, that "an attorney's role at postindictment questioning is rather limited, and substantially

different from the attorney's role in later phases of the criminal proceedings." Id. at 294 n.6.

The decision of the Iowa Supreme Court followed the Patterson rationale by considering the role of counsel at the plea proceeding. Instead of characterizing an attorney's role at a plea proceeding as unidimensional – advising a defendant whether to plead guilty or not guilty – the Iowa Supreme Court described the attorney's role as "multi-faceted." (Petition App. at 15). "A lawyer will know what defenses might be available to the crime charged" and "what questions to ask to determine whether such defenses might be factually viable." (Petition App. at 15).

Nor was the Iowa Supreme Court convinced that an attorney was of less use in an OWI case, where the concept of driving while intoxicated could be readily understood by non-lawyers. The Iowa Supreme Court recognized that the average layperson would likely be unaware of the proper procedures for invoking implied consent or grounds for suppressing evidence, "which is usually the only meaningful defense available." (Petition App. at 15).

The Iowa Supreme Court's rationale with respect to the "simplicity" of the charge finds support in various United States Supreme Court decisions regarding the importance of counsel in misdemeanor cases. This Court has recognized that the legal and constitutional questions involved in misdemeanor cases are no less complex simply because the charges are misdemeanors. Argersinger v. Hamlin, 407 U.S. 25, 33 (1972). Also, the volume of misdemeanor cases "may create an obsession for speedy dispositions,

regardless of the fairness of the result." Id. In such cases, the presence of counsel may dissipate the coercive pressure to plead guilty. Nichols v. United States, 511 U.S. 738, 763 (1994).

Thus, the decision of the Iowa Supreme Court is consistent with case law regarding the right to counsel established by this Court. The Iowa Supreme Court assessed the role counsel could play at a guilty plea proceeding and determined that an accused must be informed of the usefulness of counsel and the dangers of proceeding without counsel with respect to counsel's role at that particular proceeding. The decision of the Iowa Supreme Court does not treat the Sixth Amendment right to counsel with mechanical rigidities, but addresses the particular concerns of the right to counsel at the plea proceeding. Because the decision is consistent with established United States Supreme Court precedent regarding the right to counsel, the Petition should be denied.

II.

The Iowa Supreme Court did not Rely on a Minority Position

Petitioner asserts the Iowa Supreme Court relied on a minority view regarding the requirements for a valid waiver of the right to counsel at a plea proceeding. (Petition at 16-19). Respondent disputes Petitioner's characterization of lower court case law.

With respect to the federal circuit courts of appeals, it should be noted at the outset that relatively few decisions have discussed the particular issue of the requirements for a valid waiver of counsel at a guilty plea. When the issue has arisen, however, the circuit courts have generally adopted the same standards for reviewing the waiver.

The majority of the circuits addressing the issue have decided that a waiver of counsel is not voluntary and intelligent where a defendant is not advised of the dangers of self-representation or the usefulness of counsel at the particular proceeding. See, e.g., United States v. Salemo, 61 F.3d 214, 219-20 (3rd Cir. 1995)(holding the stage of proceedings was "clearly relevant to the content of the colloquy" and stating that the intricacies of the federal sentencing guidelines could be one factor to consider in determining whether a defendant "understands the perilous path he/she is going down in attempting to proceed to sentencing without benefit of counsel."); United States v. Miller, 910 F.2d 1321, 1324-25 (6th Cir. 1990)(applying the standards of United States v. McDowell, 814 F.2d 245, 249-50 (6th Cir. 1987)(adopting the model inquiry set forth in section 1.02-2 of the Bench Book for United States District Judges), to address the validity of Miller's waiver of counsel at a guilty plea); Shafer v. Bowersox, 329 F.3d 637, 647-48 (8th Cir. 2003)(holding plea court's colloquy was deficient at both the plea and sentencing proceedings because "the trial court asked few questions ... with respect to Shafer's waiver of counsel for the guilt phase," "did not advise him of the specific dangers or limitations related to self-representation," and "made no attempt o ... explain other services of counsel at the sentencing phase of a capital case."); United States v. Akins, 276 F.3d 1141, 1146-1148 (9th Cir. 2002)(holding that because counsel is critical at a plea proceeding, district courts must inform defendants of the dangers of proceeding without counsel at the plea proceeding and must inform defendants regarding "(1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and

disadvantages of self-representation."); Braun v. Ward, 190 F.3d 1181, 1186 (10th Cir. 1999)(upholding waiver of counsel at hearing to withdraw plea of nolo contendere but noting inquiry should focus on the purposes a lawyer can serve at the particular proceeding and what assistance the lawyer could provide at the proceeding).

In contrast, the Fourth Circuit has held that at a minimum a plea court should "(1) explain the charges and the possible punishment, (2) inquire whether any threats or pressures have been brought to bear on him, and (3) determine whether any promises have been made to him by the investigating or prosecuting officials." Aiken v. United States, 296 F.2d 604, 607 (4th Cir. 1961). The Fifth and Seventh Circuits require that a waiver be made "'with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.'" Molignaro v. Smith, 408 F.2d 795, 799 (5th Cir. 1969)(quoting Von Moltke v. Gillies, 332 U.S. 708, 724 (1948)); Day v. United States, 357 F.2d 907, 910 (7th Cir. 1966)(same).

The States appear to be equally divided on the form of the colloquy required to waive counsel at a guilty plea. Louisiana, Michigan, South Dakota, and Texas have specifically held that the Faretta inquiry is not required to waive counsel at a plea proceeding. See, e.g., State v. Strain, 585 So.2d 540 (La. 1991); People v. Schneider, 429 N.W.2d 845 (Mich. Ct. App. 1988); State v. Cashman, 491 N.W.2d 462 (S.D. 1992); Hatten v. State, 71 S.W.3d 332 (Tex. Crim. App. 2002). See also State v. Maxey, 873

P.2d 150, 154 (Idaho 1994)(holding waiver of counsel at guilty plea does not require warning of dangers of self-representation).

Other states require the colloquy to encompass a variation of the standards outlined in Von Moltke, whereby a waiver is not valid unless a defendant has an apprehension of the nature of the charges, included statutory offenses, the range of possible punishments, possible defenses, mitigating circumstances, and other facts essential to a broad understanding of the matter. Von Moltke v. Gillies, 332 U.S. 708, 724 (1948). See e.g., Garnick v. Miller, 403 P.2d 850 (Nev. 1965); In re Johnson, 398 P.2d 420 (Cal. 1965). See also People v. Christensen, 555 N.E.2d 422 (Illinois App. Ct. 1990)(holding court must conduct inquiry into defendant's understanding of the nature of the charge, the range of punishments, and his right to counsel, including appointed counsel); State v. Fulp, 558 S.E.2d 156 (N.C. 2002)(same, but adding that defendant appreciates the consequences of his decision); State v. Pollard, 657 A.2d 185 (Vt. 1995)(same as Fulp, but also inquiring into defendant's age, education and familiarity with English, and considering the complexity of the charge).

States such as Florida, Indiana and South Carolina have specifically held that the Faretta inquiry applies to guilty pleas. Clary v. State, 818 So.2d 686 (Florida Dist. Ct. App. 2002); Shelton v. State, 390 N.E.2d 1048 (Ind. Ct. App. 1979); Watts v. State, 556 S.E.2d 368 (S.C. 2001). Utah uses a variation of the Faretta and Von Moltke standards, requiring a court to advise a defendant as to his right to counsel and to ascertain whether a defendant possesses the intelligence and capacity to understand (1) the consequences of

self- representation, (2) that he will be expected to comply with court rules, and (3) the nature of the charges and proceedings, the range of allowable punishments and any other facts helpful to an understanding of the matter. State v. Arguelles, 63 P.3d 731, 750 (Utah 2003).

Florida has specified that a waiver must relate to the particular proceeding for which it is used. Brown v. State, 830 So.2d 203, 204-05 (Fla Dist. Ct. App. 2002). In fact, Florida requires a separate waiver of counsel at each critical stage of a criminal proceeding, even if the accused has waived his right to counsel previously. Id. Pennsylvania treats the waiver of counsel separate from the waiver of rights at a plea, and specifies six areas of inquiry that must be addressed with a defendant. Commonwealth v. Payson, 723 A.2d 695, 700-703 (Pa. 1999).

Other states prefer their courts to go into detail regarding the usefulness of an attorney. See, e.g., Swenson v. Municipality of Anchorage, 616 P.2d 874, 878 n.5 (Alaska 1980)(quoting from the Alaska Magistrate's checklist regarding the usefulness of an attorney); Shelton v. State, 390 N.E.2d 1048, 1051 (Ind. Ct. App. 1979)("it is better practice for the trial judge to emphasize the importance of the assistance of counsel and that counsel would assist the accused in evaluating the state's case against him, the possible defenses, if any, to the charge and the advantages and disadvantages of the alternative pleas"); People v. White, 436 N.E.2d 507 (N.Y. 1982)(vacating a guilty plea where trial court "did not utter a word, much less explain, the objectivity or professionalism counsel could supply").

As Petitioner notes, Minnesota is the most restrictive state when it comes to accepting uncounseled guilty pleas. (Petition at 16). Minnesota requires defendants to consult with an attorney before they will be allowed to enter a guilty plea. State v. Rubin, 409 N.W.2d 504, 506 (Minn. 1987). The waiver of counsel colloquy would then follow the Von Moltke standards. Id. at 505.

With respect to the circuit courts of appeals, Iowa is not following a minority position. The decision in State v. Tovar is consistent with the right to counsel as interpreted by the Third, Sixth, Eighth, Ninth, and Tenth Circuits. The Iowa Supreme Court's decision is also consistent with those States that have determined Faretta is applicable to guilty pleas, that defendants should be advised as to the usefulness of counsel, or that treat the waiver of counsel as either a separate inquiry from the inquiry for acceptance of the plea or treat it according to the particular stage of the proceedings. The Iowa Supreme Court's position is hardly an aberration and works to ensure an accused's waiver of counsel is voluntary, knowing, and intelligent. The Petition should be denied.

III.

The Decision of the Iowa Supreme Court is Consistent with Iowa's Interpretation of the Right to Counsel.

The Iowa Supreme Court's decision follows a long line of cases in which the Iowa Supreme Court has zealously protected the right to counsel. As early as 1907, the Iowa Supreme Court recognized that the Iowa Constitution guarantees criminal defendants the

assistance of counsel. Korf v. Jasper County, 108 N.W. 1031, 1032 (Iowa 1907). The right extended to all stages of the criminal proceeding. Id. at 1033.

Iowa's case law regarding the right to counsel developed little until State v. Cooper, in which the Iowa Supreme Court held that an uncounseled conviction could not be used as a basis for imposing incarceration upon a defendant or enhancing a charge against a defendant. State v. Cooper, 343 N.W.2d 485 (Iowa 1984). In forging its decision, the court relied, in part, upon Baldasar v. Illinois, 446 U.S. 222 (1980), and upon its own view of the importance of the right to counsel. Id. at 486.

During the last 20 years, the Iowa Supreme Court has taken a closer look at cases involving the right to counsel. Initially, the Iowa Supreme Court held that defendants may waive the right to counsel, and that the nature of the inquiry would vary with "the nature of the offense and the ability of the accused to understand the process." State v. Hindman, 441 N.W.2d 770, 772 (Iowa 1989). If the offense was one that could be readily understood by laypersons, then the inquiry only needed to assure "an awareness of the right to counsel and a willingness to proceed without counsel in the face of such awareness." Id.

In State v. Rater, the Iowa Supreme Court recognized that a defendant's request to proceed without counsel must be "'clear and unequivocal.'" State v. Rater, 568 N.W.2d 655, 658 (Iowa 1997)(quoting Faretta v. California, 422 U.S. 806, 835 (1975)). He must then "'knowingly and intelligently'" waive his right to counsel. Id. (same). The Court held that the trial court "must make the defendant 'aware of the dangers and

disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Id. (citations omitted).

More recently, the Iowa Supreme Court has taken a more deliberated approach to the waiver of counsel, addressing several cases in which it determined that the district courts' inquiries into waivers of counsel were not valid. In State v. Cooley, the Court reiterated the holding of Von Moltke that "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand" regarding a defendant's "apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." State v. Cooley, 608 N.W.2d 9, 15 (2000)(quoting Von Moltke v. Gillies, 332 U.S. 708, 724 (1948)). In particular, the Iowa Supreme Court stated that a waiver is made knowingly when the accused is apprised of the Von Moltke factors, "admonished as to the usefulness of an attorney at that particular proceeding, and made cognizant of the danger in continuing without counsel." Id. at 15. The Court reversed Cooley's conviction, holding that the inquiry by the district court failed to adequately inform him of the dangers of inherent in self-representation. Id. at 16.

In State v. Martin, the Iowa Supreme Court determined that Martin's waiver of the right to counsel was not done knowingly and intelligently. State v. Martin, 608 N.W.2d 445, 450 (Iowa 2000). The Court found that the district court did little more than advise Martin to keep his attorney. Id. The Court reiterated its earlier recommendation that

judges and attorneys look to the Bench Book for United States District Judges or the Iowa Bench Book for model inquiries. Id. (citing State v. Spencer, 519 N.W.2d 357, 360 n.1 (Iowa 1994)).

Finally, in State v. Stephenson, the Iowa Supreme Court reversed Stephenson's conviction when it determined the district court failed to conduct an adequate inquiry into his waiver of counsel. State v. Stephenson, 608 N.W.2d 778, 782-83 (Iowa 2000). The Court held that courts were "required to engage the accused in a colloquy sufficient to apprise a defendant of the dangers and disadvantages inherent in self-representation." Id. at 782. The Court noted the dual purpose of the colloquy: to protect the constitutional rights of the accused and to insulate the judiciary from claims of abuse by creating a formal record. Id.

Thus, in 2000, the Iowa Supreme Court reversed the convictions of three defendants because the district courts had failed to conduct adequate inquiries into the defendants' requests to waive counsel. The Court recognized the district courts' obligation to conduct an adequate on-the-record inquiry as "an absolute duty." Id.

It is not surprising, given the recent failure of Iowa district courts to conduct even minimally sufficient inquiries into waivers of counsel, that the Iowa Supreme Court used the Respondent's case to provide further guidance to the district courts on the basic elements needed for waivers of counsel at plea proceedings. The decision in State v. Tovar was not a "paternalistic gloss on the Sixth Amendment." (Petition at 23). It was instead a response to the repeated inadequacies the Iowa Supreme Court was finding in

criminal proceedings. It was a directive to the lower courts to adhere to State v. Cooley and Patterson v. Illinois in considering the particular proceeding when formulating their inquiries.

In fact, the Iowa Supreme Court would have been likely to find Respondent's waiver of counsel invalid without considering the suggestions it outlined in its opinion. The failure was not that Respondent was not advised that there may have been defenses available to him that he would be in danger of waiving if he proceeded to plead guilty without the assistance of counsel or that he would lose the opportunity to obtain an independent opinion on whether it was wise to plead guilty. (Petition App. at 18). Rather, the Iowa Supreme Court noted that "[n]ot only was there an absence of any dialogue concerning the value of having an attorney when pleading guilty, there was no colloquy with Tovar that alerted him to the dangers and disadvantages of entering a guilty plea without the advice of counsel." (Petition App. at 16). In other words, "the district court did not engage Tovar in any meaningful discussion concerning his waiver of counsel at the plea proceeding." (Petition App. at 18-19).

Having once again observed a court's failure to engage a defendant about the usefulness of counsel at the particular proceeding for which waiver was requested, the Iowa Supreme Court sought to remedy the problem by clarifying what sort of inquiry should be conducted. The Iowa Supreme Court's ruling is consistent with its understanding of the importance of the right to counsel and its prior case law. For these reasons, the Petition should be denied.

IV.

Contrary to Petitioner's Assertion, the Decision of the Iowa Supreme Court Will Not Have a Severe Adverse Impact

Petitioner asserts that the Iowa Supreme Court's decision will have a "broad and deep impact on Iowa law." (Petition at 11). Petitioner alleges the decision will: 1) inhibit the guilty plea process; 2) allow defendants to challenge any past guilty plea; and 3) prohibit prosecutors from charging enhanced offenses where the plea record is insufficient. (Petition at 11-12).

First, the decision of the Iowa Supreme Court will not inhibit the plea process. At most, it may take the plea court five more minutes to address a defendant and advise him of the usefulness of an attorney and the consequences of proceeding pro se, in addition to the colloquy already required for acceptance of the plea. This concern is further alleviated in misdemeanor cases, where the plea court may accept a written plea of guilty from a defendant pursuant to Iowa Rule of Criminal Procedure 2.8(2)(b) (2003). (Petition at 3-4). If the waiver of counsel at the plea proceedings appears in the written plea form and waiver of rights, it will not take a significant amount of time for the court to review the plea and waiver form personally with a defendant.

Second, the decision of the Iowa Supreme Court will not create a tidal wave of defendants seeking to vacate their prior guilty pleas. Respondent recognizes that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." Griffith v. Kentucky, 479 U.S.

314, 328 (1987); Morgan v. State, 469 N.W.2d 419, 422 (Iowa 1991). Thus, there will be guilty pleas pending on direct appeal to which the Tovar decision would be applicable.

Such new rules generally do not apply retroactively, however, to cases on collateral review. Teague v. Lane, 489 U.S. 288, 311-316 (1989); Morgan v. State, 469 N.W.2d at 422. A new rule will apply on collateral view if it (1) places certain types of individual conduct beyond the ability of legislators to proscribe or (2) creates a watershed rule of criminal procedure implicating fundamental trial fairness. Id. at 311-12; Morgan v. State, 469 N.W.2d at 422.

Respondent questions whether the Iowa Supreme Court established a new rule, given that the Iowa Supreme Court had previously recognized that the colloquy regarding the waiver of counsel was to be specifically tailored to the nature of the offense, the background of the accused, and the usefulness of counsel at the particular proceeding. See, e.g., State v. Cooley, 608 N.W.2d 9, 14-15 (Iowa 2000)(citing Patterson v. Illinois, 487 U.S. 285, 299 (1988)). Even if the Iowa Supreme Court's decision did create a new rule, Respondent asserts the rule would not qualify under either exception to the non-retroactivity rule of Teague. Thus, the Iowa Supreme Court's decision would not be retroactive to cases on collateral review, which would then greatly ease Petitioner's concerns regarding the effect of the decision.

Third, the decision of the Iowa Supreme Court will not create an undue burden for prosecutors. The "practical difficulty of obtaining aged transcripts and filings in otherwise settled convictions" is not as significant when the misdemeanor plea has been

entered via a written plea and waiver of rights pursuant to Iowa Rule of Criminal Procedure 2.8(2)(b). (Petition at 4-5, 11). In these cases, the waivers will appear in the court record, which is easily accessible. Although there may be more difficulty in obtaining a transcript, it is not an impossibility. The transcript of Respondent's 1996 guilty plea and sentencing was, for example, made part of the record during his 2001 felony case. (Petition at 5-8).

Furthermore, any difficulty prosecutors might have in obtaining the record for previous convictions would apply regardless of whether this Court affirms or overrules the decision of the Iowa Supreme Court. The prosecution is required to show that a defendant either was represented by counsel or intelligently and voluntarily waived counsel before the defendant's prior conviction may be used to enhance a current offense. See Baldasar v. Illinois, 446 U.S. 222, 226 (1980) (holding a prior uncounseled misdemeanor conviction could not be used to enhance a later offense), overruled in part by Nichols v. United States, 511 U.S. 738, 749 (1994)(holding uncounseled convictions could be used for enhancement purposes as long as no incarceration was imposed in the earlier offense); State v. Cooper, 343 N.W.2d 485, 486 (Iowa 1984)(precluding use of uncounseled theft convictions to enhance later theft charge to an aggravated misdemeanor). Thus, even if this Court were to disapprove of the colloquy suggested by the Iowa Supreme Court, the prosecution would still have the obligation of obtaining the court record relating to previous convictions if it wanted to use those convictions for enhancement purposes.

Notably, Petitioner fails to mention that many of the enhancement offenses listed in the Petition specify a time frame under which a previous conviction would qualify for enhancement.[1] A previous conviction for domestic assault, for example, would not qualify to enhance a current offense if the previous conviction occurred more than six years prior to the current offense. Iowa Code § 708.2A(5)(a) (2003). A previous conviction for harassment would not qualify as an enhancing offense if it occurred more than 10 years prior to the current offense. Id. § 708.7(2)-(3). The Operating While Intoxicated chapter under which Respondent was convicted limits the enhancement timeline to previous OWI offenses occurring no more than 12 years prior to the current offense. Id. §§ 321J.2(4)(a), 321.12(4). With respect to these offenses, the risk that prosecutors would be unable to obtain "aged transcripts" is minimal. (Petition at 11).

It is also appropriate to discuss the burdens of proof with respect to the waiver issue as it relates to Petitioner's claim of "adverse impact." The State would have the burden of proof that an accused validly waived the right to counsel once an accused asserts the error. State v. Cooley, 608 N.W.2d 9, 14 (Iowa 2000). The burden shifts, however, on collateral review. In a postconviction proceeding, a defendant would have to establish the facts supporting an invalid waiver by a preponderance of the evidence.

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[1]. Respondent notes Petitioner misidentified the enhancement statute relating to sexual assault. The statute cited by Petitioner, Iowa Code section 709.11, relates to assault with intent to commit sexual abuse. Iowa Code § 709.11 (2003). The enhancement statute is located at sections 901A.1 and 901A.2. Id. §§ 901A.1-.2.

Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977). This also eases any potential hardship that might be placed on prosecutors.

Finally, the colloquy suggested by the Iowa Supreme Court would actually assist Petitioner in the long run. If all Iowa courts were to follow the colloquy at plea proceedings, there would be little question that a defendant was adequately advised and made aware of his right to counsel at the plea proceeding. If defendants proceed to plead guilty after being advised of the usefulness of counsel at the plea stage and the consequences of proceeding without counsel at the plea stage, then the presumption is that they elected to plead guilty with "eyes open." Adams v. United States ex rel McCann, 317 U.S. 269, 279 (1943).

The Sixth Amendment was designed to protect an accused's rights to counsel and to a fair trial, not to ease the burden on prosecutors seeking convictions. See Powell v. Alabama, 287 U.S. 45, 61-64 (1932)(discussing the history of the right to counsel in England and the colonies, and quoting an historical treatise that found the English common law practice of denying counsel to felony defendants was an expedient means for convicting the accused). The Iowa Supreme Court's decision is consistent with the intent of the Sixth Amendment and will not create undue hardship in the prosecution of offenses. The Petition should be denied.

CONCLUSION

For all of the reasons discussed above, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF FILING

On the 7th day of July, 2003, I the undersigned, did file Respondent's Brief in Opposition with the Clerk of United States Supreme Court, by timely mailing, by First Class U.S. mail, pursuant to Supreme Court Rule 12(2) an original and ten (10) copies to said Clerk at the Supreme Court of the United States, One First Street, N.E., Washington DC 20543

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